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No. 99-548

Supreme Court, U.S.
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In the

Supreme Court of the United States

IN RE: THE LESLIE FAY COMPANIES, INC.,

Debtors.

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD, and RAYMOND J. TERWILLIGER,

Petitioners,

vs.

THE LESLIE FAY COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Have petitioners satisfied Supreme Court R. 10 and presented any basis for this Court to grant certiorari to review the merits of the decision below?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent The Leslie Fay Companies, Inc. states that it does not have any subsidiaries in which it holds less than a 100% ownership interest and that have issued shares to the public.

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

Counter-Statement of the Case 2

Statement of Facts 2

The Releases 3

Petitioners' Objections to Debtors' Counsel's Fee Applications 5

The Decision on the Merits 5

The Appeals 6

Argument 8

Page

THERE IS NO REASON TO GRANT CERTIORARI HERE 8

A. The Bankruptcy Court's Jurisdiction to Adjudicate Petitioners' Proofs of Claim Does Not Present an Unsettled Question of Law 11

B. Application of 28 U.S.C. § 157(d) to Petitioners' Claims Is Not A Disputed Issue of Law Requiring this Court's Review 14

C. There is No Basis for this Court to Review the Final Fee Order 18

Conclusion 20

TABLE OF AUTHORITIES

Page(s)

Cases:

In re Adelphi Inst., Inc.,
112 B.R. 534 (S.D.N.Y. 1990) 16

In re Arlen's Dep't Stores, Inc.,
615 F.2d 925 (2d Cir. 1979) 18

In re Bennett Paper Corp.,
63 B.R. 8 (Bankr. E.D. Mo. 1985) 16

Braxton v. U.S.,
500 U.S. 344 (1991) 8

In re Cache, Inc.,
71 B.R. 851 (Bankr. S.D. Fla. 1987) 16

Central Hudson Gas & Electric Corporation v. Empresa Naviera Santa S.A.,
56 F.3d 359 (2d Cir. 1995) 19

In re Chadbourne Indus., Ltd.,
100 B.R. 663 (S.D.N.Y. 1989) 15, 16

Christiansen v. Colt Indus. Operating Co.,
486 U.S. 800 (1988) 19

Commissioner v. Schleier,
515 U.S. 323 (1995) 17

Electro-Wire Prods. v. Sirote & Permutt, P.C., (In re Prince),
40 F.3d 356 (11th Cir. 1994) 7, 18

Page(s)

First Fidelity Bank, N.A., New Jersey v. Hooker Investments, Inc. (In re Hooker Investments, Inc.), 937 F.2d 833 (2d Cir. 1991) 11

In re FSC Corp., 33 B.R. 212 (Bankr. W.D. Pa. 1983) 19

Germain v. Connecticut Nat'l Bank, 988 F.2d 1323 (2d Cir. 1993) 12, 13

Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989) 12

Gray v. English, 30 F.3d 319 (10th Cir. 1994) 7, 18

In re Howell, 148 B.R. 269 (Bankr. S.D. Tex. 1992) 19

Interco, Inc. v. Priest (In re Interco., Inc.), 135 B.R. 359 (Bankr. E.D.Mo. 1991) 17

Katchen v. Landy, 382 U.S. 323 (1966) 11, 12

Langenkamp v. Culp, 498 U.S. 42 (1990), *reh'g denied*, 498 U.S. 1043 (1991) 12

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 8

Page(s)

Lytle v. Household Mfg., Inc.,
494 U.S. 545 (1990) 11

Matter of Evangeline Refining Co.,
890 F.2d 1312 (5th Cir. 1989) 5

In re Nine Assocs. Inc.,
76 B.R. 943 (S.D.N.Y. 1987) 18

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 14

In re O'Connor,
52 B.R. 892 (Bankr. D. Okla. 1985) 19

Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.),
68 F.3d 26 (2d Cir. 1995) 6

Rhett v. Carnegie Center Assoc. (In re Carnegie Center Assoc.),
129 F.3d 290 (3d Cir. 1997) 17

In re Roberts,
75 B.R. 402 (D. Utah 1987) 19

Security Farms v. Int'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers,
124 F.3d 999 15

Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.),
922 F.2d 984 (2d Cir. 1990), *cert. denied*,
502 U.S. 808 (1991) 15

Page(s)

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) 14

U.S. v. Ron Pair, Inc., 489 U.S. 235 (1989) 15

In re Vicars Ins. Agency, Inc., 96 F.3d 949 (7th Cir. 1996) 15

Wittes v. Interco Inc. (In re Interco, Inc.), 137 B.R. 328, 329 (E.D. Mo. 1992) 16

Statutes:

11 U.S.C. §§ 101, *et seq.* (1993 and Supp. 1999) ..... *passim*

28 U.S.C. § 157 (1993 and Supp. 1999) ..... *passim*

29 U.S.C. §§ 621, *et. seq.* (1999) 4

42 U.S.C. §§ 2000e, *et seq.* (1994 and Supp. 1999) 4

42 U.S.C. §§ 12101, *et seq.* (1995 and Supp. 1999) 4

43 Pa. Stat. Ann. §§ 951, *et seq.* (1996) 4

Fed. R. Bank. P. 2014 18

N.Y. Exec. Law §§ 290, *et seq.* (McKinney 1993) 4

Sup. Ct. R. 10 ..... *passim*

Page(s)

Treatises:

Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 4001 (West 2d ed. 1996) 9

Legislative History:

130 Cong. Rec. H 1850, daily ed. March 21, 1984 15

Hearings before the House Committee and the Judiciary, 67th Cong., 2d Sess., Sec. 33 (1922) 9

S. Rep. No. 55, 98th Cong., 1st Sess. 16 (1983) 15

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The Leslie Fay Companies, Inc., *et al.* (collectively "Leslie Fay"), Weil Gotshal and Manges ("WG&M"), McDermott, Will & Emery ("MW&E") and Parker Chapin Flattau & Klimpl ("Parker Chapin") respectfully submit this brief in opposition to the petition for a writ of certiorari by Jacob V. Falbaum ("Falbaum"), Anthony Gill ("Gill"), Emile Lewkowiez ("Lewkowiez"), Lee L. Kishbaugh ("Kishbaugh"), Raymond J. Terwilliger ("Terwilliger") and Elizabeth Michaud ("Michaud") (collectively "Petitioners").

Counter-Statement of the Case

This petition for certiorari arises out of the affirmance by the United States Court of Appeals for the Second Circuit ("Court of Appeals") and the United States District Court for the Southern District of New York ("District Court") of the decisions of the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") to: (i) disallow all of Petitioners' $80 million administrative expense priority age, sex and disability discrimination claims; and (ii) award approximately $12 million in fees plus expenses to the three law firms that served as Debtors' Counsel for their services on behalf of Leslie Fay during a period of nearly four-and-one-half years.

Although presented as a petition for certiorari, Petitioners' brief does not even attempt to satisfy the requirements of Supreme Court R. 10. Instead, Petitioners treat this Court as if its function were to provide yet a third level of appellate review of the merits of the Bankruptcy Court's decisions. As will be shown below, Petitioners simply have not, and cannot, fulfill their obligation of demonstrating a basis for this Court to grant certiorari. Accordingly, their petition should be denied.

Statement of Facts

On April 5, 1993, about two months after the discovery and announcement of accounting irregularities in certain of its Securities and Exchange Commission filings, Leslie Fay and three of its affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code") with the Bankruptcy Court. Thereafter, Leslie Fay continued to operate and manage its business as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy

Code. (A 3842). The Fourth Amended and Restated Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code, that was proposed jointly by Leslie Fay and its Official Committee of Unsecured Creditors (the "Plan"), was confirmed by order of the Bankruptcy Court entered on April 21, 1997. (A 3746-3779). The effective date of Leslie Fay's confirmed Plan was June 4, 1997.

Petitioners are former employees of Leslie Fay. Falbaum and Lewkowiez were terminated pursuant to a reduction in force ("RIF") in August 1992, about eight months before the Chapter 11 filing. Terwilliger's employment was terminated separately in August 1992. Gill's employment was terminated in March 1992. Kishbaugh was terminated pursuant to a RIF in November 1993. Michaud voluntarily retired on December 31, 1992.

The Releases

Leslie Fay company policy prohibits the payment of severance benefits to an involuntarily terminated employee unless that employee executes a release waiving any and all claims he or she may have against the company up to the date of the release. In accordance with this policy, Leslie Fay offered Falbaum, Gill, Terwilliger, Kishbaugh and Lewkowiez the opportunity to obtain severance benefits in consideration for the execution of a release. Michaud voluntarily retired, so she was not asked to sign a release and was not entitled to or offered severance. Falbaum, Gill, Terwilliger and Kishbaugh each executed a release at or after their terminations and received severance payments.[1] Lewkowiez declined to sign a release, so he did not receive any severance.

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[1] The claims released included those later asserted by Petitioners in these cases.

Despite their releases, on June 1, 1993, shortly after Leslie Fay filed its bankruptcy petition, Falbaum, Gill and Terwilliger, joined by Lewkowiez and Michaud, filed with the Bankruptcy Court proofs of claim against Leslie Fay. Kishbaugh's proof of claim was filed on August 3, 1994, following his November 1993 termination. Falbaum, Gill, Terwilliger, Kishbaugh and Lewkowiez alleged that their employment with Leslie Fay had been terminated (and that they subsequently were not rehired) due to age, in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* (1998) (the "ADEA"), the New York State Human Rights Law, N.Y. Exec. Law §§ 290, *et seq.* (McKinney 1993) (the "NYSHRL"), and the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. §§ 951, *et seq.* (1996) (the "PHRA"). Michaud alleged that she had been constructively terminated, discriminated and/or retaliated against due to her gender and disability in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C §§ 2000e, *et seq.* (1994 and Supp. 1998) ("Title VII"), the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101, *et seq.* (1995 and Supp. 1999) (the "ADA"), the NYSHRL and the PHRA. Collectively, Petitioners sought $80 million of damages in respect of these claims. Petitioners proofs of claim did not, however, demand a jury trial.

Leslie Fay objected to Petitioners' claims on the merits and on the ground that certain of the claims were barred by the releases those Petitioners had signed. Thereafter, on several occasions Petitioners moved the District Court for an order pursuant to 28 U.S.C. §157(d) withdrawing the reference of their claims from the Bankruptcy Court, urging, among other things, that mandatory withdrawal of the reference was required because resolution of their claims would require consideration of both title 11 and the ADEA, and permissive withdrawal was appropriate in order to preserve their jury trial rights. The District Court denied each of these motions.

Petitioners' Objections to Debtors' Counsel's Fee Applications

In June 1997, all of the professional firms that had provided services in connection with Leslie Fay's bankruptcy case applied to the Bankruptcy Court for a final award of fees and expenses.[2] Although Petitioners had not objected to the previous twelve sets of interim fee awards made during the four years that Leslie Fay's bankruptcy case was pending, Petitioners objected to the final fee applications filed by WGM, Leslie Fay's general bankruptcy counsel, MW&E, Leslie Fay's special labor counsel, and Parker Chapin, Leslie Fay's special corporate counsel (collectively "Debtors' Counsel"). Petitioners claimed that Debtors' Counsel each suffered from impermissible conflicts of interest and thus all of the fees previously awarded to them should be disgorged.[3] At a hearing on July 31, 1997, the Bankruptcy Court overruled all of Petitioners' objections and granted the final fee applications of all Debtors' Counsel. 18a.

The Decision on the Merits

The Bankruptcy Court issued its Decision After Trial on Employees' Discrimination Claims (the "Merits Decision") on August 18, 1997 and held that: (i) although Petitioners demonstrated a *prima facie* case of discrimination, they failed to meet their ultimate burden of proving that

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[2] In bankruptcy cases, professionals employed by or on behalf of a debtor's estate must apply to the Bankruptcy Court for approval of their compensation. *See* 11 U.S.C. §330(a).

[3] The Bankruptcy Courts are permitted to make interim fee awards to professionals during a bankruptcy case pursuant to 11 U.S.C. §331. However, all interim awards are subject to reconsideration at the time of the final fee application. *See, e.g., Matter of Evangeline Refining Co.*, 890 F.2d 1312 (5th Cir. 1989).

discriminatory animus was the underlying reason they were terminated or not rehired or not promoted; (ii) Leslie Fay had met its burden of producing legitimate, non-discriminatory reasons for each of the challenged adverse employment actions; and (iii) as a result, Petitioners were not entitled to any recovery on their claims. 31a-119a. The Bankruptcy Court also reiterated its earlier holding that petitioners lost their rights to a jury trial of their claims when they filed proofs of claims. 72a. The Bankruptcy Court further held that petitioners had failed to assert that their claims were personal injury torts within the meaning of 11 U.S.C. §157(b)(2)(B) and thus had waived any right to withdrawal of the reference based on that argument. 73a-75a.

In its findings of fact, the Bankruptcy Court credited the testimony of witnesses called by Leslie Fay with respect to the absence of any discriminatory intent. 39a-40a. The Bankruptcy Court's findings also were supported by admissions made by petitioners and their spouses. 40a-41a; 50a; 53a; 101a-102a. In contrast, the Bankruptcy Court found that Terwilliger, the "chief witness for the Petitioners attesting to the age-biased animus driving the layoffs in Pennsylvania", was not credible. 38a; 40a.

The Appeals

Petitioners appealed from the Merits Decision and the Bankruptcy Court's fee awards to the District Court and the Court of Appeals. Each of these courts reviewed the Bankruptcy Court's findings of fact on the clearly erroneous standard and its conclusions of law *de novo*. *See Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.)*, 68 F.3d 26, 29 (2d Cir. 1995). Additionally, the courts reviewed the Bankruptcy Court's grant or denial of fees to Debtors' Counsel, based upon an alleged lack of disinterestedness or adverse interest under 11 U.S.C. § 328(c), under the abuse of discretion standard. *See Electro-Wire Prods. v. Sirote &*

Permutt, P.C., (In re Prince), 40 F.3d 356, 359-60 (11th Cir. 1994); *Gray v. English*, 30 F.3d 319, 324 (10th Cir. 1994).

Both the District Court and the Court of Appeals affirmed the Bankruptcy Court's decisions in all material respects. The Court of Appeals specifically rejected Petitioners' claim that the Bankruptcy Court did not have jurisdiction to try their claims without a jury:

> It is, however, well settled law that the determinative factor as to a bankruptcy court's jurisdiction is that the objecting party filed a proof of claim resulting in an adversary proceeding that involved the allowance or disallowance of claims against the estate. By filing a proof of claim, a creditor also forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim. Because the creditors in this case filed proofs of claim with the bankruptcy court seeking direct allowances against the debtor's estate, the bankruptcy court had the jurisdiction to adjudicate these claims without a jury.

2a-3a (internal citations omitted). The Court of Appeals also rejected Petitioners' claim that withdrawal of the reference was mandated by 28 U.S.C. §157(d):

> Nor are we persuaded that mandatory withdrawal was appropriate under 28 U.S.C. § 157(d), which is reserved for cases requiring significant interpretation, as opposed to simple application of federal laws apart from the bankruptcy statutes. . . . Only one of the creditors' claims even arguably required the significant interpretation of non-Bankruptcy Code federal statutes. In particular, the bankruptcy court was required to decide a then-unsettled issue when adjudicating Kishbaugh's claims as to whether releases that were otherwise unenforceable could be

> ratified by the releasor's failure to tender back the consideration give for the release. The creditors never explicitly pointed out the difficulty of the issue, however, in its motions to withdraw or as a ground for withdrawal. Any error involved in adjudicating it was, moreover, harmless because the issue was decided in Kishbaugh's favor.

3a (internal citations omitted). Finally, the Court of Appeals held that Petitioners' evidentiary challenges were unfounded, and their allegations of attorney conflict were either "conclusory, unappealable or fail to allege an actual conflict." 4a (internal citations omitted).

Argument

THERE IS NO REASON TO GRANT CERTIORARI HERE

Long ago, this Court, by its then Chief Justice, William Howard Taft, held that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). *See also Braxton v. U.S.*, 500 U.S. 344, 347 (1991) ("a principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law").

What was true then is true today. "Despite the broad sweep of its powers, the Supreme Court has long since lost the capacity to function as a final source of general appellate jurisdiction. It cannot possibly hear all litigants . . . [but rather] must husband its scarce adjudicatory resources for the most fundamental constitutional and statutory questions. . . " Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 4001 at 4 (West 2d ed. 1996).

In hearings before the House Committee on the Judiciary, Chief Justice Taft also explained that "no litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose." He further stated that:

> When a case goes beyond [the courts of appeal], it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Hearings before the House Committee on the Judiciary, 67th Cong., 2d Sess., ser. 33 at 2 (1922).

For this reason, Supreme Court R. 10 specifically provides that "review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The Rule sets out the following bases for which this Court grants a petition for a writ of certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10 (a)-(c).

Petitioners have failed to present this Court with any legal issues that satisfy the requirements of Rule 10. Instead, petitioners seek an unjustified third level of general appellate review of findings of fact and conclusions of law that were twice affirmed in all material respects by the Court of Appeals and District Court. For the reasons outlined above, this Court should not allocate its scarce and valuable time to review ordinary litigation disputes of this type. For this and all of the reasons discussed below, the Court should deny the petition.

A. The Bankruptcy Court's Jurisdiction to Adjudicate Petitioners' Proofs of Claim Does Not Present an Unsettled Question of Law

Petitioners first argue that this Court should grant certiorari to determine the allegedly unsettled question of whether filing proofs of claim against Leslie Fay's estate subjected them to the equitable jurisdiction of the Bankruptcy Court and caused them to lose their right to a jury trial on those claims.[4] *See* Pet. Br. at 8-14. According to Petitioners, this is an "important issue. . . that warrants resolution." *Id.* at 7.

However, this issue has been resolved by controlling decisions of this Court. This Court repeatedly has held that a creditor who voluntarily agrees to participate in the equitable reordering of a debtor's estate by filing a proof of claim has no jury trial rights with respect to proceedings relating to the "allowance or disallowance" of those claims.[5] *See*

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[4] Petitioners also assert, without citing any authority, that the Bankruptcy Court's equity jurisdiction cannot preempt jury trial rights guaranteed by a federal discrimination statute. Pet. Br. at 10-11. However, petitioners' claims are no different from those of any other creditor who seek to recover damages against a debtor based on a common law or statutory cause of action that would carry with it a right to a jury trial if asserted outside of the bankruptcy context. And, as this Court held in *Katchen v. Landy*, 382 U.S. 323 (1966), the need for orderly administration of bankruptcy estates presents exactly the type of circumstance in which a court of equity is authorized to resolve issues that otherwise would be determined by a jury in a legal action. *See Katchen*, 382 U.S. at 339-340. *See also First Fidelity Bank, N.A., New Jersey v. Hooker Investments, Inc. (In re Hooker Investments, Inc.)*, 937 F.2d 833, 839 (2d Cir. 1991) (same). For this reason, Petitioners' reliance on this Court's decision in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), a case that did not involve claims presented in the Bankruptcy Court, is inapposite.

[5] The only exception to this rule are personal injury and wrongful death claims that are required to be heard in the District Court pursuant to 28 U.S.C. §§ 157(b)(2)(B) and (b)(5).

Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 58 (1989) (a creditor's right to a jury trial on a claim depends upon whether the creditor has submitted a claim in the bankruptcy court, thereby submitting to the equitable jurisdiction of the bankruptcy court); *Langenkamp v. Culp*, 498 U.S. 42 (1990) (creditor who filed proof of claim had no right to jury trial of bankruptcy trustee's preference action against that creditor, because preference action was equitable part of the claims allowance/disallowance process), *reh'g denied*, 498 U.S. 1043 (1991); *Katchen v. Landy*, 382 U.S. 323, 336-37 (1966) (no Seventh Amendment right to a jury trial for determination of objections to allowance and disallowance of proofs of claims). Like the *Langenkamp* creditors, once Petitioners filed their proofs of claim they triggered the Bankruptcy Court's equitable jurisdiction and lost any right to a jury trial of those claims.[6]

Petitioners attempt to distinguish *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323 (2d Cir. 1993), the case relied on by the Court of Appeals in its decision below, on its facts. In doing so, Petitioners ignore the central holding of that case and of this Court's decisions in *Granfinanciera*, *Langenkamp* and *Katchen*, which were specifically cited therein:

> An action that bears on the allowance of a claim is *integrally related to the equitable reordering* of debtor-creditor and creditor-creditor relations. If an

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[6] Petitioners claim that they did not "voluntarily" agree to participate in the claims allowance process because they were forced to file proofs of claim by the Bankruptcy Court's bar order and the law of ADEA, or they would have waived their right to recover against Leslie Fay. Pet. Br. at 11-13. Whether or not petitioners "voluntarily" filed their proofs of claim does not change the fact that by doing so, petitioners invoked the equity jurisdiction of the Bankruptcy Court and thereby lost their right to a jury trial of those claims. Indeed, no other conclusion would makes sense: no creditor "voluntarily" files a proof of claim but rather does so in order to participate in the equitable reordering of the debtor's estate.

> equitable reordering cannot be accomplished without resolution of what would otherwise be a legal dispute, then that dispute becomes an essential element of the broader equitable controversy. . . . [T]he Katchen, Granfinanciera, and Langenkamp line of Supreme Court cases stands for the proposition that *by filing a proof of claim a creditor forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim* — and does so not so much on a theory of waiver as on the theory that the legal issue has been converted to an issue of equity. It is reasonable that a creditor or debtor who submits to the equity jurisdiction of the bankruptcy court thereby waives any right to a jury trial for the resolution of disputes vital to the bankruptcy process, such as those involving the determination of who is a valid creditor. . .

Id. at 1329 (emphasis added).

Here, no preference or other action against Petitioners by the debtor was filed. Rather, the Bankruptcy Court simply adjudicated Leslie Fay's objections to Petitioners' claims -- the very "claims allowance and disallowance" process that the Court has held falls squarely within the Bankruptcy Court's equity jurisdiction and as to which no Seventh Amendment jury trial right attaches. Petitioners also have not demonstrated that a split exists among the United States courts of appeals in their application of this rule; nor have petitioners even attempted to demonstrate the existence of a single decision by any Court of Appeals or state court that conflicts with this Court's decisions. Under these circumstances, petitioners have not established a basis for this Court to grant certiorari.

B. Application of 28 U.S.C. § 157(d) to Petitioners' Claims Is Not A Disputed Issue of Law Requiring this Court's Review

Petitioners also argue that this Court should grant certiorari to determine if withdrawal of the reference of their discrimination claims was mandated by 28 U.S.C. §157(d). According to petitioners, Section 157(d) and this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) prohibit Bankruptcy Courts from trying any claim that requires consideration of both Title 11 and other laws affecting interstate commerce, and argue that the application of Section 157(d) to discrimination claims is a matter of "first impression." *See* Pet. Br. at 14. However, *Northern Pipeline* dealt with a state law claim asserted by a debtor against a third party rather than the adjudication of objections to a creditor's claim against a debtor. Therefore, that case is inapposite.

Section 157(d) provides, in relevant part, that "[t]he district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States . . . " Congress enacted Section 157(d) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, in response to the Court's decision in *Northern Pipeline*.

Since its enactment, this Court, the United States district courts and the courts of appeal have interpreted the jurisdictional grant set forth in the 1984 Bankruptcy Amendments expansively and, as a corollary, have sought to limit the "escape hatch" created by Section 157(d). *See, e.g. Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 569 (1985) ("this Court's holding in [Marathon] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising

under state law, without consent of the litigants and subject only to ordinary appellate review"); *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 951-952 (7th Cir. 1996) ("courts have uniformly agreed that a narrow interpretation [of Section 157(d)] is required"); *Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984 (2d Cir. 1990), *cert. denied*, 502 U.S. 808 (1991) (same).

Circuit courts that have been presented with this issue agree that withdrawal of the reference pursuant to Section 157(d) is mandated only if the

> issues require the interpretation, as opposed to mere application, of the non-title 11 statue, or when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law. The legal questions need not be of cosmic proportions, but must involve more than mere application of existing law to new facts.

Vicars Ins. Agency, 96 F.3d at 954. *See Ionosphere Clubs*, 922 F.2d at 995 (same); *Security Farms v. Int'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1008 and n. 4 (9th Cir. 1997) (withdrawal of the reference is mandatory in "cases requiring material consideration of non-bankruptcy federal law. . . By contrast, permissive withdrawal does not hinge on the presence of substantial and material questions of federal law").[7] Indeed,

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[7] Petitioners rely on statements by Representative Kastenmeier contained in the legislative history of Section 157(d) (reported at 130 Cong. Rec. H1850, daily ed. March 21, 1984). Pet. Br. at 16. Most courts have not accorded Rep. Kastenmeier's statements the weight ascribed to them by petitioners. *See In re Chadbourne Indus., Ltd.*, 100 B.R. 663, 666 (S.D.N.Y. 1989) (collecting cases). Other remarks by Rep. Kastenmeier also indicate that he intended Section 157(d) to be read narrowly. *See* S. Rep. No. 55, 98th Cong., 1st Sess. 16 (1983); *see also Vicars*, 96 F.3d at 952. In any event, in *U.S. v. Ron Pair, Inc.*, 489 U.S. 235, 240-241 (1989), this Court held with respect to the Bankruptcy Code

as one district court has said, "a literal reading of this statute would eviscerate much of the work of the bankruptcy courts." *In re Adelphi Inst., Inc.*, 112 B.R. 534, 536 (S.D.N.Y. 1990).

In this case, the District Court and Court of Appeals applied these well-settled principles to find that mandatory withdrawal was not appropriate under the facts of this case because resolution of Petitioners' claims did not require significant interpretation of non-bankruptcy law.[8] 3a. At least one other court also has held that adjudication of a creditor's ADEA claims did not require withdrawal of the reference under Section 157(d) for the same reason. *See Wittes v. Interco Inc. (In re Interco, Inc.)*, 137 B.R. 328, 329 (E.D. Mo. 1992); *see also In re Chadbourne Indus. Ltd.*, 100 B.R. 663, 667-669 (S.D.N.Y. 1989) (denying creditor's Section 157(d) motion in case involving determination as to whether trustee was a "successor employer" within the meaning of the NLRA).[9]

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that "it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."

[8] Petitioners' claim that withdrawal of the reference pursuant to Section 157(d) was mandated because the Bankruptcy Court was required to decide a then unsettled issue of law relating to whether Kishbaugh ratified his otherwise invalid release by failing to tender back the consideration paid is unfounded. As is evident from the Merits Decision, the Bankruptcy Court did not disallow Kishbaugh's claim on this basis, but rather considered and rejected his claim on the merits. 77a-80a. Accordingly, the Court of Appeals correctly held that any error resulting from the Bankruptcy Court's consideration of this issue was harmless. 3a.

[9] Petitioners apparently seek to demonstrate the existence of a conflict in the courts' application of Section 157(d) to discrimination claims by citing *In re Bennett Paper Corp.*, 63 B.R. 8 (Bankr. E.D. Mo. 1985) and *In re Cache, Inc.*, 71 B.R. 851 (Bankr. S.D. Fla. 1987). However, neither of these courts actually applied the "substantial and material" consideration standard applied by the *Interco* court and by the

Given that the courts below simply applied well-settled precedent to the particular facts of this case, and that Petitioners have not demonstrated any basis to distinguish discrimination claims from the myriad of other claims as to which a creditor loses the right to a jury trial if he or she files a proof of claim,[10] there is no reason for this Court to grant certiorari to decide this issue.

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overwhelming majority of other courts considering motions for withdrawal of the reference pursuant to Section 157(d). In any event, only one circuit court, the Second Circuit below, has specifically considered the application of Section 157(d) to a discrimination claim. *See also Rhett v. Carnegie Center Assoc. (In re Carnegie Center Assoc.)*, 129 F.3d 290 (3d Cir. 1997) (Third Circuit affirmed bankruptcy court's adjudication of a creditor's pregnancy discrimination proof of claim without commenting on the applicability of Section 157(d)). Accordingly, the specific application of Section 157(d) to discrimination claims does not present an issue that is ripe for review by this Court. *See* Sup. Ct. R. 10.

[10] Petitioners' argument that withdrawal of the reference of their discrimination claims was required by the "personal injury tort" exemption set forth in 28 U.S.C. §157(b)(2)(B) and (b)(5) also fails. Petitioners have not cited any authority demonstrating a split in the application of this section to discrimination claims by the United States courts of appeal. Therefore, there is no reason for this Court to grant certiorari to resolve this issue.

Moreover, this Court previously has held that ADEA claims are not in the nature of personal injury claims. *See Commissioner v. Schleier*, 515 U.S. 323, 335-336 (1995) (back pay and liquidated damages awarded for an ADEA claim cannot be excluded from an individual's gross income under Section 104(a)(2) of the Internal Revenue Code because they are not based on tort or tort type rights and are not received "on account personal injuries or sickness). Likewise, at least one other court specifically has held that ADEA claims are not personal injury claims within the meaning of 28 U.S.C. §157(b)(2)(B) and (b)(5). *See Interco, Inc. v. Priest (In re Interco., Inc.)*, 135 B.R. 359, 362 (Bankr. E.D. Mo. 1991).

C. There is No Basis for this Court to Review the Final Fee Order

Petitioners' final attempt to invoke the certiorari jurisdiction of this Court likewise fails to present any legal issue that satisfies the criteria set forth in Sup. Ct. R. 10. In an attempt to manufacture an issue worthy of review, petitioners posit the existence of a division of authority among the circuits concerning the disclosure required of professionals seeking to be retained by or on behalf of a debtor's estate.[11] However, a close analysis of their petition reveals that there is no such split of authority. Rather, petitioners are arguing that the reviewing courts misapplied the law to the facts presented.[12] Thus, despite the argument urged, Petitioners merely seek another review on the merits.[13]

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[11] Professionals seeking to be retained by or on behalf of a debtor's estate must submit an application for retention for the Bankruptcy Court's approval. *See* 11 U.S.C. §327 and Fed. R. Bank. P. 2014. In the application, the professional is required to disclose all of the professional's relationships with the "debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee or any person employed by the United States Trustee." *See* Fed. R. Bank. P. 2014(a).

[12] As stated above, the District Court and Court of Appeals reviewed the Bankruptcy Court's rejection of petitioners' objections to Debtors' Counsels' fee applications on the grounds of conflicts of interest and disinterestedness under the abuse of discretion standard. *See Electro-Wire Prods. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 359-60 (11th Cir. 1994); *Gray v. English*, 30 F.3d 319, 324 (10th Cir. 1994). The District Court and Court of Appeals likewise reviewed the Bankruptcy Court's award of fees and expenses to Debtors' Counsel under the abuse of discretion standard. *In re Arlen's Dep't Stores, Inc.*, 615 F.2d 925, 943 (2d Cir. 1979); *In re Nine Assocs. Inc.*, 76 B.R. 943, 945 (S.D.N.Y. 1987).

[13] In any event, it is clear that the decisions of the Bankruptcy Court, District Court and Court of Appeals were correct on the merits. As the Bankruptcy Court correctly noted in its decision authorizing the Debtors to retain MW&E, there is no *per se* rule that prohibits a debtor's counsel

Even if Petitioners had presented proper legal issues for this Court's review, the issues they raise were not preserved in their appeals below. Indeed, all of the purported "conflicts" and disclosure objections issues were considered and overruled by the Bankruptcy Court in earlier decisions, from which Petitioners did not appeal.[14] Accordingly, the Court of Appeals correctly held that Petitioners were precluded from relitigating those issues by the doctrines of law of the case and collateral estoppel. *See Christiansen v. Colt Indus. Operating Co.*, 486 U.S. 800, 815-16 (1988); *Central Hudson Gas & Electric Corporation v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995).

Finally, Petitioners' attempt to create an issue for certiorari by arguing that the reason Leslie Fay filed objections to their proofs of claim in the Bankruptcy Court was to undermine Petitioners' jury trial rights is frivolous. As a debtor-in-possession, Leslie Fay and its Counsels were obligated to investigate the validity of every claim filed

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from *simultaneously* representing a corporate debtor and its principals. *See also In re FSC Corp.*, 33 B.R. 212, 213 (Bankr. W.D. Pa. 1983) (court determined that no conflict existed on the part of a law firm that represented both a corporate debtor and its officers); *In re Roberts*, 75 B.R. 402, 403 (D. Utah 1987) (same); *In re O'Connor*, 52 B.R. 892 (Bankr. D. Okla. 1985); *In re Howell*, 148 B.R. 269, 270 (Bankr. S.D. Tex. 1992) (same). Accordingly, the mere fact that Debtors' Counsel represented certain of Leslie Fay's officers and directors in other or related proceedings does not present a *per se* or disabling conflict that would have warranted their disqualification.

[14] Specifically, the Bankruptcy Court fully adjudicated the issues raised by the United States Trustee relating to WG&M's failure to fully disclose certain relationships in its application for retention. In that regard, the Bankruptcy Court ordered WG&M to disgorge approximately $1 million in legal fees and expenses it previously had been paid and limited the role of WG&M in Leslie Fay's bankruptcy proceedings. Petitioners' attempt to invoke certiorari on this issue is nothing more than an improper invitation to this Court to impose additional sanctions upon WG&M where there is no legal issue to be considered. Petitioners' invitation should be declined.

against the estate and to object to claims that lacked merit. Petitioners' effort to characterize these routine employment disputes as animated by bad faith or any improper purpose was specifically rejected by the courts below and again fails to present a legal issue for this Court to consider.

Conclusion

For all of the foregoing reasons, this Court should deny the petition for certiorari in all respects.

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November 30, 1999

Respectfully submitted,

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